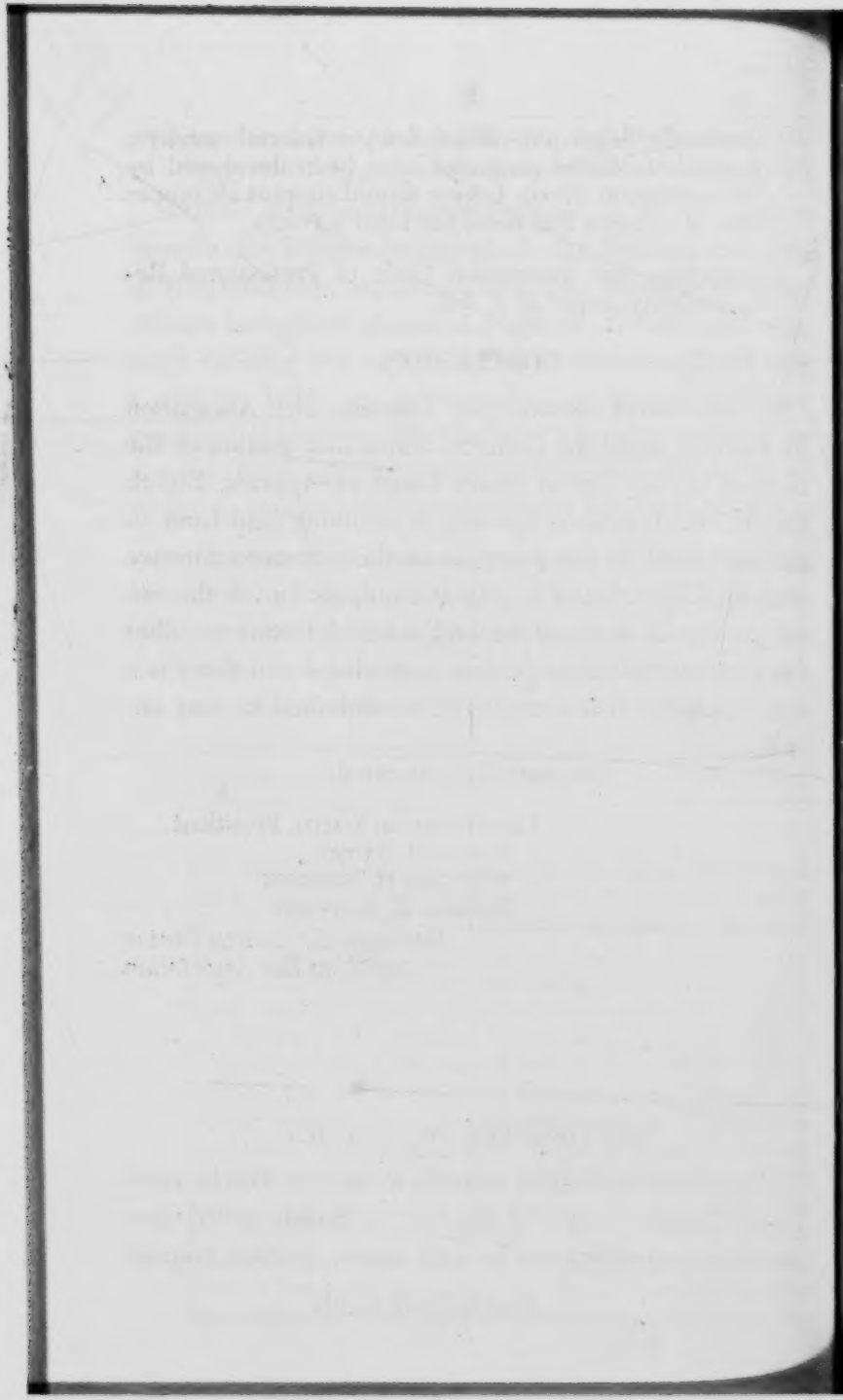

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF JR., *et al.*,

Petitioners,

—against—

ROBERT O. McDONNELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AS *AMICUS CURIAE*

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TABLE OF AUTHORITIES

Cases:

Batchelder v. Geary, —— F. Supp. —— (No. C-71-2017, RFP, N.D. Cal., Apr. 16, 1973) 24

Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973) 24

Gagnon v. Scarpelli, 41 U.S. 778 (1973) 16
Goldberg v. Kelly, 397 U.S. 254 (1970) 2

Morrissey v. Brewer, 408 U.S. 471 (1972) 2, 16

Nolan v. Scafati, 301 F. Supp. 1 (D. Mass. 1969), reversed and remanded 430 F.2d 548 (1st Cir. 1970) 5

United States v. Forness, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942) 20, 21
United States ex rel. Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973) 20

Williams v. New York, 337 U.S. 241 (1949) 9

State Statutes:

Ill. Rev. Stat., ch. 38, §§1000-8-7, 8-8, 6-3, 8-3 23

Iowa Code Ann. 356.21 4

PAGE

Other Authorities:

American Bar Association, Standards Relating to Sentencing Alternatives and Procedures (1968) 9

American Bar Association, Standards Relating to Appellate Review of Sentences 45-47 (1968) 20

Burger, *We Refuse to Be Responsible for the People We Imprison,* 1 Student Lawyer 13 (March 1973) 19

Cloward, Social Control in the Prison, in PRISON WITHIN SOCIETY (Hazelrigg, ed. 1968) 7

Cohen, *In Search of a Model Act for Prisoners' Rights,* 1973 Wash. U. L.Q. 621, 636 24

Cressey, Contradictory Directives in Complex Organizations: The Case of the Prison, 4 Ad. Sci. Q. 1 (1959) 7

DAVIS, K., DISCRETIONARY JUSTICE 105 (1969) 19

Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Wash. U. L.Q. 243, 302 20

E. CAHN, CONFRONTING INJUSTICE (1962) 4

Frank, *Say It With Music,* 61 Harv. L. Rev. 921 (1948) 20

GOFFMAN, E., ASYLUMS (1961) 7

Hirschop and Millemen, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811, 812 (1969) 4

Jacobs, *Prison Discipline and Inmate Rights,* 5 Harv. Civ. Lib.-Civ. Rts. L. Rev. 227, 234, n. 30 (1970) 26

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Joint Commission on Correctional Manpower and Training, The Legal Challenge to Corrections 65 (1969) 13

Kassebaum, G., Ward, D., and Wilner, D., Prison Treatment and Parole Survival: An Empirical Assessment 10 (1971) 7

Lohman, Current Decline in Respect for Law and Order, 31 Fed. Prob. 30 (Dec. 1967) 14
Lovell and Nelson, Correctional Management and Changing Goals of Corrections in Problems of Criminal Justice Administration 82 (N. Cohen ed. 1969) 6

Mattick, The Prosaic Sources of Prison Violence, 31 Public Welfare 54, 57 (Fall, 1973) 5, 6
McAnany, *Imprisonment under the Illinois Unified Code of Corrections: Due Process, Flexibility and Some Future Doubts,* 49 Chicago-Kent L. Rev. 189, 192-93 (1973) 23
MENNINGER, K., THE CRIME OF PUNISHMENT (1968) .. 9
Mittman, Dr. Howard (Chief Psychologist at the Federal Correctional Institution, at Terminal Island, California) in Punishment and Discipline in Prison, 32 American J. of Corr. 10 (May-June 1970) 4
Murton, *Inmate Self-Government,* 6 U. San Fran. L. Rev. 87 (1971) 11

NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT (1973) 7, 8
NCCD, PEACEFUL SETTLEMENT OF PRISON CONFLICTS (1973) 10

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Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821 20
Note, *Prisoners Gain Time: Incentive, Deterrent or Ritual Response?*, 21 U. Fla. L. Rev. 103, 115-116 (1968) 26
Note, The Problems of Modern Penology: Prison Life and Prisoners' Rights 671, 692 (1967) 26

Prange, Fr. Francis B., The Self-Improvement Group at the McNeil Island Penitentiary, 27 Fed. Prob. 34 (March 1963) 10
President's Commission on Law Enforcement and Administration of Justice, Task Force Report; Corrections (1967) 14

Remarks of Mr. Louis Blom-Cooper, Member, Home Secretary's Advisory Council on the Penal System, at a conference on Due Process and Prison Disciplinary Decisions, Academy for Contemporary Problems, January, 1974 25
Report on Corrections, pp. 51-52 (1973) 22
Report of the New York State Special Commission (Attica (1972)) 5
Report on Professional Responsibility of the Joint Conference of the American Bar Association and the American Association of Law Schools (1958) 14
Roscoe Pound-American Trial Lawyers Conference, *A Program for Prison Reform* (1972) 23
Rubin, *Introduction to Symposium on the Model Act for Protection of the Rights of Prisoners*, 1973 Wash. U. L.Q. 553, 560 25

PAGE

Sykes, THE SOCIETY OF CAPTIVES (1958) 7

Task Force Report: Corrections at p. 13 (1967) 9

Taylor, A. (Lecturer in Psychology, Victoria University of Wellington, New Zealand). *Good Will Attracts Troubled Inmates and Inspires Confidence*, 27 Fed. Prof. 11, 12 (March, 1963) 11

United States Commission on Civil Rights, in its Minimum Standards of Civil and Human Rights of Inmates in Correctional Institutions (1973) 22-23

Wilmer, Harry A. (M.D., and Psychiatric consultant to San Quentin Prison and the California Dept. of Corrections), Good Guys and Bad Guys: A Litmus Paper Concept of Man, 30 Fed. Prob. 8, 12 (Sept. 1966) 12

Wilmer, Harry A., M.D., "The Role of the 'Rat' in Prison," 20 Federal Probation 44, March 1965 13

Zimbardo, P., Pathology of Imprisonment, 9 Transaction 4 (April 1972) 13

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The legal issues raised in this appeal and any decision this Court may render in it are of national importance in a period of increased concern over the administration of criminal justice and the rights of inmates in institutions. The issue of due process at disciplinary hearings is at the heart of corrections and treatment of criminals. For these reasons, the National Council on Crime and Delinquency (the "National Council") sought and obtained leave to participate amicus curiae in this case.

The National Council, a nonprofit membership corporation with offices across the United States has a membership of over 60,000 citizens and officials. It was organized in 1907 and incorporated as a national service agency under

the name of The National Probation Association in 1921. The representative nature of the Council is further indicated by the make-up of its officers and Board of Trustees which is annexed as an appendix B for the information of the Court.

With its advisory Council of Judges, other advisory councils and its State Councils, the National Council works on community, statewide and national levels to improve inmates procedural and substantive rights, probation, parole and institutional services and facilities, as well as to stimulate community programs for the prevention, treatment and control of crime and delinquency.

I.

Due Process in Disciplinary Hearings Is an Essential Ingredient in the Reintegration of the Offender Into the Community.

"Due Process," as this court has noted many times, is not a rhetorical talisman; it is the essence of the concepts of fairness of a society. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). The court below, as other courts, required the implementation of basic due process requirements, in prison disciplinary hearings, *see Morrissey* v. *Brewer,* 408 U.S. 471 (1972), because the United States Constitution requires such protections when a prisoner suffers a "grievous loss." The respondent's brief in this case, as well as some of the amicus briefs, have demonstrated the legal soundness of those views, and those arguments will not be repeated here.

Rather, this amicus brief will seek to explore the meaning and impact which due process protections would have, and have had, upon the prison community, and upon the goals and hopes of prisons for a fairer, more humane prison system.

For over sixty years, the National Council on Crime and Delinquency (NCCD) has sought to bring rationality to the prison system. The fight has been long, and difficult. For this reason, the Council, in 1972, promulgated a MODEL ACT FOR THE PROTECTION OF THE RIGHTS OF PRISONERS, attached to this brief as Appendix A, which set out the bare minimum which was necessary to establish a fair prison system. Because that Act envisioned adoption of all those protections which the court below endorsed, NCCD felt it useful and imperative to file this amicus brief.

A. *By Reducing the "Sense of Injustice" Felt by Most Prisoners, the Provision of Due Process Protections in Disciplinary Hearings Alleviates Prison Tensions and Enhances the Possibility for a Collaborative Institution.*

It is often difficult for attorneys, or courts, whose entire universe revolves around rational decision-making, to fully comprehend the total and arbitrary power which has characterized prison authorities' control over the lives of prisoners. Administrative decisions which drastically affect the lives and liberty of thousands of prisoners have often been made on the flimsiest of information, without review. Guards, poorly trained, and poorly educated, in legal concepts and correctional philosophy have had the power to drastically affect a prisoner's life, with unadulterated, un-

checked power.[1] One guard's determination of one prisoner's guilt of one alleged offense, when translated into a disciplinary charge, can so influence the parole board, that the prisoner may spend many more years in prison, notwithstanding the arbitrariness of the guard's initial decision. In Iowa, this horror is even more direct; there, time spent in solitary confinement not only affects later parole eligibility,—but in addition, by statute, time spent in solitary confinement *does not count as part of the sentence.* Iowa Code Ann. 356.21.

Such unchecked power, even if ratified in a pro forma hearing at which no meaningful guarantees of fairness are provided, can only accentuate the prisoner's general "sense of injustice" which pervades the prison community.[2] See generally, E. CAHN, CONFRONTING INJUSTICE (1962). This, in turn, leads to a heightened frustration, which may ex-

---

[1] "Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary, or maximum security or lose "goodtime" on the basis of a single unreviewed report of a guard. When courts defer to administrative expertise, it is this guard to whom they delegated the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed administrative discretion granted to the poorly-trained personnel who deal directly with the prisoners." Hirschop and Millemen, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811, 812 (1969).

[2] Chief Psychologist, at the Federal Correctional Institution, at Terminal Island, California, Dr. Howard Mittman, has said in Punishment and Discipline in Prison, 32 American J. of Corr. 10 (May-June 1970):

> The inmate surely does not perceive our "Adjustment" Committees as helping or rehabilitative agencies. He knows them for what they really are—groups that mete out punishments . . . he believes we are less concerned about his psychological structure than we are about preventing his violation of our rules. He believes we hold these rules paramount, and demand only of him that he submit to them passively.

plode in prison violence at any moment. See Mattick, The Prosaic Sources of Prison Violence, 31 Public Welfare 54 (Fall 1973). It is not surprising, therefore, that many prison riots include, as one of the major demands, more fairness and procedural safeguards in the dispensation of prison discipline. See, e.g., REPORT OF THE NEW YORK STATE SPECIAL COMMISSION (ATTICA (1972)).

Many of those who object to full due process in a disciplinary hearing do so on the basis of a misunderstanding of prison life, or an acceptance of a distorted view, propounded by prison officials, of that life. In *Nolan* v. *Scafati*, 301 F. Supp. 1 (D. Mass. 1969), reversed and remanded 430 F.2d 548 (1st Cir. 1970), for example, Judge Wyzanski rejected a prisoner's argument for fair procedures, including cross examination and the presence of counsel, in disciplinary hearings by declaring:

> Cross-examination of a superintendent, a guard, or a fellow prisoner would almost inevitably go beyond the usual consequences of such probing in a court. It would tend to place the prisoner on a level with the prison official. Such equality is not appropriate in prison. And it is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner. There are types of authority which do not have as their sole or even principal constituent, rationality. Parents, teachers, army commanders, and above all, prison wardens have the right to depend to a large extent (though not arbitrarily) upon habit, custom, intuition, common sense not reduced to express principles, and other forms of judgment based more on experience than on logic.

Leaving aside the fact that students, soldiers, and even juveniles are now coming to be protected by the due process clause, Judge Wyzanski's statement is fallacious even on its own premise, for it demonstrates a lack of understanding of the actual construct of the prison society. Virtually every study in the last decade or more has agreed that the prison society is not one of two "classes" (guards and prisoners) but, rather, one in which some prisoners are elevated to status because of the need of guards to "accommodate" some parts of the inmate population. Thus, for example, Hans Mattick, a former administrator of the Cook County Jail in Chicago, and now a sociologist at the University of Illinois, has recently observed that:

> In any situation where a relatively small group of men control and direct a much larger group, the controllers depend, in a very real sense, on the passive acquiescence of the controlled. Such passivity is purchased by an effective sharing of power.
>
> Mattick, The Prosaic Sources of Prison Violence, 31 Public Welfare 54, 57 (Fall, 1973).

This "accommodation" is made easier by other ambiguities in the prison's role:

> "(Prison) administrators, finding it difficult to harmonize treatment and custody goals, have tended to generalize policy to such an extent that subordinate staff are relatively free to decide many significant questions of action and procedure."
>
> Lovell and Nelson, Correctional Management and Changing Goals of Corrections in Problems of Criminal Justice Administration 82 (N. Cohen ed. 1969).

See also G. Kassebaum, D. Ward, and D. Wilner, Prison Treatment and Parole Survival: An Empirical Assessment 10 (1971); Cressey, Contradictory Directives in Complex Organizations: The Case of the Prison, 4 Ad. Sci. Q. 1 (1959).

This kind of "accommodation," this sharing of power, is not accomplished evenhandedly—while certain prisoners are "favored," others are dealt with more severely, or left to the whim and caprice of those prisoners with whom power is, for the moment, "shared." See, e.g., Cloward, Social Control in the Prison, in PRISON WITHIN SOCIETY (Hazelrigg, ed. 1968); Sykes, THE SOCIETY OF CAPTIVES (1958). See also, E. GOFFMAN, ASYLUMS (1961).

Just recently, NCCD, echoing the sentiments of many concerned and interested persons, has issued a call for the establishment, in every prison, of meaningful and permanent grievance mechanisms, to deal with prisoner complaints before they explode into riot. NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT (1973). The study which formed the basis for this call noted that in most prisons in our society today there is an uneasy peace, based primarily upon coercion, accommodation, or "deal-making" between prisoners and their keepers. This fragile relationship stems, essentially, from the refusal of prison administrators, as a group, to acknowledge, even implicitly, the possible equality of position occupied by the remaining prisoners. This system, said the report, "verifies the prisoner's suspicion that he is caught in a game in which his freedom is at stake." *Id.*, at 11.

The profound effect which court decisions requiring due process have had upon this system is made apparent by

the findings in the NCCD report: "As a result of these and other decisions, decision-making procedures in prisons are being formalized. Custodial efficiency based on *sub rosa* power plays and a labyrinth of rules and regulations is far more difficult to achieve than ever before . . ." NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT 13 (1973). In short, the effect of due process requirements is to make the prison not only more open, but more honest and rational, thus leading to establishing a meaningful relationship between prisoners and prison personnel based not upon intricate maneuvering, but upon fairness and openness.

It is not difficult to discern, therefore, some of the motivating forces behind prison administrators' reluctance to implement truly meaningful due process reforms in such hearings. An "open" prison, where the prisoner is seen, if not as an equal, at least as a human being with some basic human rights, is a threat to the established order—an order based upon the ability of prison administrators to favor some prisoners over others without accountability for their actions. This motivation, and not fear of prison riots—which, as we have suggested, are often sparked by a feeling of indignation heightened by a *lack* of due process and fairness—can account for much the opposition to changes in the "standard operational procedure." Such reasons obviously do not reach constitutional magnitude; but in addition to being bad law, they are poor correctional policy as well, for while they may achieve short-range peace within the prison, they will, eventually, prove self-defeating. For these reasons, then, as well as the constitutional reasons urged in the other briefs supporting the views of the Eighth Circuit, due process in prison disciplinary procedures is necessary and desirable.

B. *By Enhancing the Prisoner's Self-Esteem, by Affording Him Fair Treatment, the Provisions for Due Process Protections in Disciplinary Hearings Become an Affirmative Aid in the Reintegrative Process.*

It is now well-established that retribution is no longer the goal of the correctional process. *Williams* v. *New York*, 337 U.S. 241 (1949). Instead, correctional authorities and courts alike have stressed the need to assure offenders, when released from the prison, can function adequately and acceptably in the larger society. See, e.g., K. MENNINGER, THE CRIME OF PUNISHMENT (1968); American Bar Association, Standards Relating to Sentencing Alternatives and Procedures (1968). This movement culminated in a strong statement by the President's Commission on Law Enforcement and the Administration of Justice:

> A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation. And the 'collaborative regime' advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights, and are subject to the absolute authority of correctional officials.
>
> Task Force Report: Corrections at p. 13 (1967).

The movement toward recognition of the offender as an integral part of the larger community, even while imprisoned, and a desire to aid his adjustment to that community when released, has taken various forms, with some

urging the "rehabilitation" of the prisoner, while others have suggested his "reintegration" into the community even during the incarcerative period.[3] The 1967 President's Commission clearly accepted the latter view, and it is the one endorsed by NCCD as well. See NCCD, PEACEFUL SETTLEMENT OF PRISON CONFLICTS (1973).

Examples of the truly "collaborative" or "reintegrative" ideal model are highly encouraging in this regard. In the early 1960's, for example, an experimental group at the McNeil Island Penitentiary in Washington emphasized the need for all members of the staff, as well as the prisoners and members of the community, to be joined in a closely cooperative effort with commonality of purpose—to return the prisoner to a productive life in the community. Openness and confrontation were encouraged. Not only was reintegration into the community achieved in a large number of cases, but (disciplinary infractions within the prison were greatly reduced). Fr. Francis B. Prange, The Self-Improvement Group at the McNeil Island Penitentiary, 27 Fed. Prob. 34 (March 1963).

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[3] The "treatment"—"rehabilitative" model of prisoner operations, with its focus on the emotional needs of the "sick" prisoner, makes the mistake of attempting to adapt the prisoner to his present environment, the prison, rather than attempting to prepare him for productive life in the external community. The defects of this approach, and the necessity of fostering a climate of open confrontation and responsible decision-making in collaboration with staff and community, has long been recognized. Because of the general perception that the rehabilitation model has failed, a recent study, conducted by NCCD, has found that national commissions and expert bodies have turned to the new model of reintegration, with greater hope of success. NCCD, PEACEFUL RESOLUTION OF PRISON CONFLICT 22 (1973). Both models were designed to alter criminal behavior, but the reintegration model stresses the need to make decisions and to test the alternatives for their effect on the community. The aim is to reduce the stigma attached to criminality and encourage normal behavior.

Another author from the same era reminded us that a prisoner's non-therapeutic contacts with custodial personnel, especially disciplinary contacts, "CAN BE as much a positive factor contributing to a changed outlook as any other beneficial experience." A. Taylor (Lecturer in Psychology, Victoria University of Wellington, New Zealand). *Good Will Attracts Troubled Inmates and Inspires Confidence,* 27 Fed. Prof. 11, 12 (March, 1963) (emphasis added).

One extraordinary experiment in prisoner self-government has illustrated both the difficulty and the advantage of relying on the personal resources of the prisoner as an agent of his own development. Thomas Murton, appointed Superintendent of the Arkansas Penitentiary System in 1967, established wide-ranging prisoner self-government councils throughout his entire system. These groups of prisoners, with the help, but not control, of the Superintendent, dealt with disciplinary problems, prisoner grievances, and classification. Murton's experience was one of virtually unbounded enthusiasm, and led him to conclude that although it was often unpredictable, allowing the prisoner to participate fully and actively in the process of prison management, is the only effective way to maintaining and building the responsibility and self-reliance necessary for reintegration. See Murton, *Inmate Self-Government,* 6 U. San Fran. L. Rev. 87 (1971).

These experiments, and others like them now going on, in Washington State, Massachusetts, and elsewhere, have demonstrated both the efficacy and the viability of the reintegrative concept in prison management. Part of that concept, of course, is affording inmates due process in the institution.

Moreover, one of the basic elements of the reintegration model is the need to change the prisoner's negative perception of his self-worth; his belief that "there is nothing lower than a con."

Many authors have understood the impossibility of reintegration so long as prisoners continue to share that self-perception, a perception all too often encouraged and enhanced whether consciously or unconsciously by prison administrators.[4]

In prison, in which some officials have unchecked power over inmates, causes the powerless inmates to lose all concept of self-worth, and causes the officials to lose the capacity of self-criticism. This is the fundamental barrier to reintegration:

> The basic hurdle is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules and procedures that permit manageable diversity, thereby maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have, as a consequence of their conviction and confinement, claims relating to the maintenance of contact with institutions and individuals in the open com-

[4] See e.g. Harry A. Wilmer (M.D., and Psychiatric consultant to San Quentin Prison and the California Dept. of Corrections) affirming the necessity of open confrontation to encourage the self-respect necessary for rehabilitation: "Thus, everyone in a therapeutic community must be able to face confrontation by others. No one can legitimately hide behind status, hierarchical position . . . (or) . . . power . . ." Good Guys and Bad Guys: A Litmus Paper Concept of Man, 30 Fed. Prob. 8, 12 (Sept. 1966).

munity and claims relating to conditions within the institutions.

Joint Commission on Correctional Manpower and Training, The Legal Challenge to Corrections 65 (1969).

It is conceivable that, if all members of the prison staff were ideally fair-minded, then no procedures would be necessary to protect prisoners' rights and reduce their sense of powerlessness and worthlessness. Inevitably, however, the staff becomes as entrapped by the peculiar caste system of the prison as do the prisoners themselves. See P. Zimbardo, Pathology of Imprisonment, 9 Transaction 4 (April 1972). The fear and suspicion that is embodied in the "inmates' code" thoroughly inhibits any effort to establish the rapport necessary for a normal, healthy society. The tightlipped hostility of the resolve to "do one's own time" is honored by the prisoners and encouraged by the staff. The resulting isolated helplessness makes reintegration difficult if not impossible. The prisoner grows in his conviction that the only way to survive in prison is to cause no trouble and to avoid as much as possible all interaction with the staff except for manipulative interaction.[8] Any cooperation with staff may be interpreted as informing, the cardinal breach of the "convict code."

The traditional role of procedure in an institution is that of safeguard against interested exploitation, abusive short

[8] "The Role of the 'Rat' in Prison," by Harry A. Wilmer, M.D. 20 Federal Probation 44, March 1965. Any effort by custodial staff to use information gathered from informers as a basis for disciplinary actions confirms the prevailing distrust and suspicion. Any positive feelings are immediately dissipated by any reliance of authority on the most hated element of convict life, the informer. More importantly, from the prisoners' viewpoint, even the merest suspicion of such reliance must be completely removed before the process of reintegration can begin.

cuts, and corroding misinterpretation. See the Report on Professional Responsibility of the Joint Conference of the American Bar Association and the American Association of Law Schools (1958). It is designed neither to promote delay nor to foster dissension; rather, it is designed to give full opportunity to be treated fairly and to prevent arbitrary and uncritical use of power. Furthermore, the opportunity for the accused to present as complete an argument as he judges to be possible gives him the sense of having been treated fairly. It is this sense of justice which nourishes self-esteem and diminishes the feeling that "the whole world is against him." The feeling of participation in the administration of justice, and the collaborative effort to do what seems right to all concerned parties, increases not only the sense of self-worth but also respect for the administrators of law and for the law itself:

> Our remedy (for disrespect for the law) will be found in a greater dialogue and a fuller participation in the counsels and decisions of the majority by those who have been and continue to be excluded from the making and implementation of the law. The remedy is in "just laws," democratically designed and sensitively enforced. Lohman, Current Decline in Respect for Law and Order, 31 Fed. Prob. 30 (Dec. 1967) p. 30.

The advocacy of an open institution creating a partnership in rehabilitation involving prisoners, staff, and the outside community received support from the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967). In urging the adoption of a collaborative institution, the Commission in no manner rejected the necessity of procedural safe-

guards indeed urging them as an integral part of that vision:

> The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in fact and perceived to be fair by offenders is surely consonant with the 'collaborative regime' emphasized as desirable by modern correction, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for and cooperation with authority requires the guaranty of fairness. *Id.* at 13.

The collaborative institution is one which emphasizes a cooperative effort to return the prisoner to a normal life in society. The foundation of the effort is a concept of self-worth and independent responsibility. This concept is one which grows in an atmosphere of mutual respect between staff and prisoner, and a healthy regard for institutional goals and practices. In many ways, this framework receives its most severe challenge in disciplinary proceedings. If prisoners lose confidence in the staff in this vital area, it may never be regained. Any suspicion of unfair or autocratic treatment in these sensitive matters will thoroughly undermine all efforts at reintegration into normal society.

In calling for new models and new solutions of conflict situations in prison, NCCD has no naive belief in their panacea effect. Neither due process in disciplinary hearings nor a general atmosphere of fairness in prison will guarantee reintegration; but without these, and other important steps, these important goals cannot be realized.

The NCCD recognizes that in prison administration we are dealing with one of the most difficult areas of life, and one which admits no easy solutions. But it must be admitted that all approaches to solutions which have repressed independent decision-making and a context of open confrontation, have failed utterly. Certainly one of the basis for this failure is the extreme powerlessness of prisoners, individually and collectively, and the feeling of helpless isolation which this actual lack of power engenders. It is our belief that the adoption of full procedural protections in disciplinary hearings will go far to alleviate the feeling of powerlessness. Only then will a first step have been taken on the long journey by community, staff, and prisoner, toward the reintegration of the prisoner into normal community life.

C. *When Full Due Process Protections Are Required at Grievance Hearings, Prison Officials Are Better Able to Understand, and Thus Respond Appropriately, to Prisoner's Sense of Isolation, Frustration and Injustice.*

It is now well-settled that before a "grievous loss" may be inflicted, fundamental due process requires (1) written notice of charges; (2) a hearing; (3) at which the person charged, or about to suffer a "grievous loss," may present evidence; and (4) cross-examine adverse witnesses before (5) an impartial tribunal that (6) will decide on the record, and give a statement of reasons for that decision. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). There is, moreover, strong indication from this court that in proceedings where human liberty or the extent of imprisonment is at stake, the right to counsel applies. E.g., *Gagnon* v. *Scarpelli*, 41 U.S. 778 (1973).

In this action, of course, the prisoner, McDonnell, seeks all of these rights to protect his interest against "grievous

loss." The Council supports this view, since we believe that each of these rights is essential to the collaborative institution and the reintegration of the offender into society. Indeed, we do not perceive the state of Nebraska to argue differently, except with regard to the right of the prisoner to be represented by retained or appointed counsel in such disciplinary hearings. Nevertheless, because each of the due process rights enhances the concept of the reintegration ideal to correctional theory, we think it important to explore these rights in that context.

The presence of counsel (or at least of counsel-substitute) furthers the collaborative prison concept, by structuring the honest confrontation between prisoner and prison administrator concerning roles and behavior in the institution. Challenges to the institutional rules as being too vague ("vicious eyeballing" was an offense in at least one state's prisons until 1971) or unreasonable (in one state, at least, it was a violation of prison rules to sit on a bench in the yard because fifteen years earlier the bench had been painted; when the paint dried, the rule against sitting on it remained) or as discriminatorily enforced are significant, rational challenges to the disciplinary charges brought against an individual prisoner, and should be encouraged, in any institutional setting, as a quest for rationality. Presentation of those challenges, however, needs the assistance of someone whose very liberty and status in the institution is not jeopardized at the very moment of the hearing.

Just as importantly, however, the requirement of counsel will assist the administrator in reevaluating his own institutional role and the methods employed to enforce them. Steeped in a quasi-military tradition, prison administra-

tors, and particularly prison security personnel are rarely encouraged to reassess the rules, or the rationale for the rules, or the methods in which they are enforced. When a prisoner comes before a board comprised of at least one prison security representative, his challenge to the rule will simply not have much persuasive force.[8] Over a period of time, however, as security personnel on the board are confronted again and again, by counsel, to analyze the rules, and the underlying rationale for the rules, they may realize that prisoner complaints and defenses to charges may, in at least some instances, be legitimate. At that point, the collaborative institution takes a great step forward. But, given the nature of prisoner-guard relationships in present institutions, the only meaningful way to both protect the rights of prisoners and move forward toward that goal is to afford the prisoner some articulate spokesman to plead his cause.

It is for this same reason—the possibility that an "outsider" may ask poignant questions which will stir reevaluation that would not occur otherwise—that the requirement of an impartial tribunal, in amicus' view, must include, at the bare minimum, one "outside," non-correctional person. Again, this brief is not aimed at the legal inquiries, although cited in this brief, *infra* p. 16, and in the respondent's brief are numerous cases and authorities for this general proposition. Here, amicus urges a more modest suggestion—that the presence of an objective nonpartisan

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[8] No aspersions, of course, are thrown here on prison guards, etc. The point is that the very rigid hierarchical structure of security personnel makes questioning of rules, and of rule violations, virtually unthinkable; until the collaborative institution is a reality, where security personnel can deal with prisoners on a more human basis, it is unrealistic to expect that they will listen closely to the prisoner's challenge.

on the board will likely result in both prisoners and prison administrators taking a new view of themselves. Indeed, it is this same hope, though in a slightly different context, which has moved NCCD, among many, many others to urge the adoption of grievance mechanisms inside prisons. The need for impartial arbiters cannot be gainsaid. See Burger, *We Refuse to Be Responsible for the People We Imprison*, 1 Student Lawyer 13 (March 1973). Here, as on grievance boards, that need is imperative if we are to make both prisoner and prison official aware of the rationality of each other's views, and spur forward the collaborative institution and the ultimate reintegration of the prisoner into society.

There are a number of sound purposes in requiring a statement of reasons for the decision of any administrative board, or quasi-judicial agency, particularly if liberty or other important rights are involved. Not only does the affected person obtain some insight into the process of decision-making and gain some understanding of the relevant factors that underlie the decision; but as well, the decision-maker becomes more responsive to the needs and viewpoints of those whom he hears. Clearly, these goals would be critical in the collaborative institution, to help in the reintegration process.

In discussing the requirement of reasons for agency action, Professor Kenneth Culp Davis underscores the view that the requirement not only makes agencies accountable to the affected person, but to its own internal operations as well:

> . . . if the facts are in the file, a superior officer has the means of checking the officer's judgment.
>
> K. Davis, Discretionary Justice 105 (1969)

Still other considerations which suggest the desirability of requiring decision-makers to state their reasons have special applicability in the prison setting. In discussing the need for a statement of reasons when parole is denied a prisoner, Robert Dawson recognized that "the necessity for making them requires some reflection (by the board) on the grounds for the decision." Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Wash. U. L.Q. 243, 302.[7] This statement echoes those of Judge Frank, in elaborating the need for requiring judges to file reasons:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts.
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> *United States* v. *Forness,* 125 F.2d 928, 942 (2d Cir.), *cert. denied,* 316 U.S. 694 (1942).

See also Frank, *Say It With Music,* 61 Harv. L. Rev. 921 (1948).

Thus, far apart from the benefits which due process, and the requirement of a statement of reasons, may bring to the prisoner, it adds to the understanding and perceptions of the prison administrator. Care in finding facts may, as

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[7] Similarly describing the purpose in requiring a parole board to give reasons for denial of parole: "The need for a statement of reasons . . . insures a responsible and just determination by the agency. . . ." *United States ex rel. Harrison* v. *Pace,* 357 F. Supp. 354 (E.D. Pa. 1973). See, in the same vein, concerning the need for a statement of reasons upon sentencing, Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 Harv. L. Rev. 821, 843, and American Bar Association, Standards Relating to Appellate Review of Sentences 45-47 (1968).

Judge Frank suggests, lead to a determination that the facts could not have been that way—that the decision simply will not down.[8] This Court, too, must have, from time to time, experienced the same awareness, the same realization that by putting pen to paper, clarifications and illuminations arise which otherwise would have been lost, to the detriment of all. Amicus urges the adoption of due process protections not only for the enlightenment of the prisoner, but for the enlightenment of the prison administrator as well.

II.

The Realization That Due Process in Disciplinary Hearings Will Accomplish Much to Both Abate Prison Tensions and Teach Both Prisoners and Administrators About the Meaning of Fairness Has Moved Many Observers of Prison Life to Urge the Acceptance of Full Due Process in Such Hearings.

Although the argument for due process in prison disciplinary hearings rests on constitutional grounds, which have been thoroughly canvassed in the respondent's main brief, the reasons outlined in prior sections of this brief for incorporating due process have moved many prestigious bodies to support those arguments for non-legal reasons as well.

Thus, for example, the Department of Justice, through its National Advisory Commission on Criminal Justice

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[8] "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." *United States* v. *Forness,* 125 F.2d 928, 942 (2d Cir.), *cert. denied,* 316 U.S. 694 (1942).

Standards and Goals has urged that all of the procedural protections endorsed by the Eighth Circuit's opinion be applied to every important disciplinary decision. In standard 2.12, the Commission declared:

> Rules governing major violations should provide for a hearing on the alleged violation which should be conducted as follows:
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> 1. The hearing should be held as quickly as possible, generally not more than 72 hours after the charges are made.
> 2. The hearing should be before an impartial officer or board.
> 3. The offender should be allowed to present evidence or witnesses on his behalf.
> 4. The offender may be allowed to confront and cross examine the witnesses against him.
> 5. The offender should be allowed to select someone, including legal counsel, to assist him at the hearing.
> 6. The hearing officer or board should be required to find substantial evidence of guilt before imposing a sanction.
> 7. The hearing officer or board should be required to render its decision in writing, setting forth its findings as to controverted facts, its conclusions and the sanction imposed.
>
> Report on Corrections, pp. 51-52 (1973).

Similarly, the United States Commission on Civil Rights, in its Minimum Standards of Civil and Human Rights of

Inmates in Correctional Institutions (1973) has called for a hearing, at which the prisoner is present, and is able to call witnesses, employ defense counsel (including counsel-substitute), and obtain written charges of the offenses. In addition, the Commission requires that there be a hearing before either an impartial board or outside referee, and the right of the prisoner to appeal the written decision of the board. These same principles, which parallel closely those endorsed by the Eighth Circuit in this case, have been endorsed by the Roscoe Pound-American Trial Lawyers Conference, *A Program for Prison Reform* (1972).

One forward-looking piece of legislation is the Illinois Unified Corrections Code, Ill. Rev. Stat., ch. 38, §§1000-8-7, 8-8, 6-3, 8-3, which provides for: (1) an impartial hearing body; (2) written notice of charges; (3) personal appearance before the body with the right to address; (4) a right by the hearing body to call other witnesses; (5) a written statement of any guilty finding; (6) review of the decision. Even these, however, are not sufficient to meet the constitutional requirements which have been promulgated by many courts. Nor was the Code itself satisfactory to its main draftsman, Patrick McAnany. In an article written shortly after the adoption of the Code, McAnany noted that the right to present other witnesses should be added to those rights, and further noted that the Administrative Regulations allowed the prisoner to cross-examine any witness called by that body. Of the latter requirement, McAnany notes that "central witnesses like the complaining guard should be made available and should be subject to cross examination" in all cases. McAnany, *Imprisonment under the Illinois Unified Code of Corrections: Due Process, Flexibility and Some Future Doubts,* 49 Chicago-Kent L. Rev. 189, 192-93 (1973).

Perhaps no single aspect of due process is more important in the prison setting, and more difficult of accomplishment, than that the trier of fact be impartial. This requirement, reflected in numerous cases throughout our history, is normally easy to meet, since it is usually judges, or administrators far removed from the "front lines," who ultimately determine the facts. In a prison disciplinary hearing, however, this is almost never attained, and only with immense difficulty, attainable. As Professor Fred Cohen has noted, fairness requires that the accused have "a fair chance to influence the result." This, he says, "can never be the case when institutional personnel sit in judgment one moment and drink coffee with the accusers the next." Cohen, *In Search of a Model Act for Prisoners' Rights,* 1973 Wash. U. L.Q. 621, 636.

Several courts, recognizing this problem, which is created by the facts of most prisons' remoteness from major metropolitan areas, have sought to provide at least some solution. In *Batchelder* v. *Geary,* —— F. Supp. —— (No. C-71-2017, RFP, N.D. Cal., Apr. 16, 1973), the court required that at least one member of any fact-finding disciplinary tribunal be a noncorrectional person, such as a member of the local bar. In *Collins* v. *Hancock,* 354 F. Supp. 1253 (D.N.H. 1973), a member of the parole board was suggested as a viable alternative to a board composed of three institutional officers.

In England, the need for impartial triers of fact finds its epitome—a "Board of Visitors," composed of persons totally outside the correctional system, often lay people, and not necessarily lawyers, hears all important cases of discipline. Recently, one of the members of that board

endorsed virtually all of those processes which we would call "due process," and which the respondent in this case sought, and was afforded, by the Eighth Circuit decision. If that recommendation were not adopted, then he suggested an alternative—all serious "offenses" should be removed from the jurisdiction of the institutional authorities, and placed where it rightly belonged: in the hands of the prosecutor, thereby affording full due process, including a jury trial, in every case. Remarks of Mr. Louis Blom-Cooper, Member, Home Secretary's Advisory Council on the Penal System, at a conference on Due Process and Prison Disciplinary Decisions, Academy for Contemporary Problems, January, 1974.

The statements in petitioner's brief concerning the position of the National Council on Crime and Delinquency in its Model Act for the Protection of Rights of Prisoners totally misunderstands the Council's position. While it is true that we specifically require counsel only in hearings where good time or solitary confinement were possible punishments, it is inaccurate to dismiss all other punishment-situations. As our then-general counsel, Sol Rubin, pointed out, the Model Act "dwell(s) not on procedural due process [but rather] . . . recognition of substantive rights, and that when these rights are violated, prisoners be released." Rubin, *Introduction to Symposium on the Model Act for Protection of the Rights of Prisoners*, 1973 Wash. U. L.Q. 553, 560. Far from lightly dismissing the issue, however, the Council's recommendations, crystallized in section 4 of the Act, should be read together with the fact that good time loss, or solitary confinement, or both, are not only possible sentences in virtually any disciplinary hearing, but, indeed, are the most imposed punishments

in disciplinary hearings.[9] Thus, the Act truly recommends the presence of counsel in every disciplinary hearing.

Moreover, the stress upon the right of the prisoner to counsel should not be read, as apparently petitioner reads it, as an exclusion or disconcern with other procedural protections. As the whole of this brief makes clear, the Council strongly endorses the entire panoply of due process, short of jury trial, in even the most mundane and routine disciplinary actions; not so much because it is a "legal" requirement, but because good corrections, good sense, and fairness to all involved require at least that much effort to afford inmates a fair hearing when punishment is at issue.

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[9] A Study of the Iowa Penitentiary has shown that solitary confinement is at least "a part of the majority of committee disposition, Note, The Problems of Modern Penology: Prison Life and Prisoners' Rights 671, 692 (1967). The same is true of federal prisons, Jacobs, *Prison Discipline and Inmate Rights*, 5 Harv. Civ. Lib.-Civ. Rts. L. Rev. 227, 234, n. 30 (1970). A study of the Florida system found that a loss of good time occurred in more than 50% of each of 10 categories of offenses, including "sleeping on the job" (50%), refusal to work (56%), "unsatisfactory work" (75%) and "insufficient work" (55%), Note, *Prisoners Gain Time: Incentive, Deterrent or Ritual Response?*, 21 U. Fla. L. Rev. 103, 115-116 (1968).

CONCLUSION

For the above reasons, amicus urges this court to affirm the decision of the Eighth Circuit Court of Appeals providing basic due process protections to prisoners.

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Certificate of Service

I, DAVID GILMAN, counsel for amicus, hereby certify that on or before April 6, 1974, three copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

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